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15 Orig.

FILED
MAR 7 19
JAMES H. McKENNEY,

Supreme Court of the United States.

Ex parte.

IN THE MATTER

OF

THE PETITION OF THE CHRISTENSEN ENGINEERING COMPANY PRAYING FOR A WRIT OF MANDAMUS.

PETITION

of Christensen Engineering Company for Mandamus to Circuit Court of Appeals, Second Circuit.

OPINION OF CIRCUIT COURT OF APPEALS.

WM. A. JENNER,
Of Counsel for Petitioner,
34 PINE STREET,
New York.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

Ex Parte

IN THE MATTER

OF

The Petition of the CHRISTENSEN ENGINEERING COMPANY praying for a writ of mandamus.

And now into this Honorable Court, by its counsel William A. Jenner, comes the Christensen Engineering Company, a corporation organized and existing under the laws of the State of Wisconsin, and respectfully asks leave of the court to file a petition herewith exhibited, for a writ of mandamus to the United States Circuit Court of Appeals for the Second Circuit, and prays the Court to direct a rule to be issued to the said United States Circuit Court of Appeals for the Second Circuit, to show cause on a day to be fixed by the court why a writ of mandamus should not issue commanding said Circuit Court of Appeals for the Second Circuit to reinstate and take jurisdiction of the petitioner's writ of error and consider and determine the same on the merits as prayed for, and the petitioner prays such other relief as may be just.

Dated, New York, February 25th, 1904.

WM. A. JENNER
Counsel for Petitioner.

5 **Petition.**

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER
OF
The Petition of the CHRISTENSEN ENGINEERING COMPANY praying for
6 a writ of mandamus.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The petition of the Christensen Engineering Company respectfully shows:—

I. That it is a corporation organized and existing under and by virtue of the laws of the State of Wis-
7 consin and has its principal place of business at Milwaukee in said State.

II. And your petitioner further shows, on information and belief, that on or about the 13th day of August, 1900 a bill of complaint in equity was filed against your petitioner by the Westinghouse Air Brake Company in the Circuit Court of the United States for the Southern District of New York wherein and whereby the said complainant alleged, among other
8 things, that it was a corporation incorporated under the laws of the State of Pennsylvania; that your petitioner, the defendant therein named, was a corporation organized under the laws of the State of Wisconsin but with an office within the Southern District of New Yark; that said complainant was the owner of certain Letters Patent issued to George A. Boyden No. 481,134, dated August 16th, 1892 for an improvement in air brakes; that your petitioner, the defendant therein, had infringed the said Letters Patent

by making, using and selling the said patented device within said Southern District of New York, and praying a preliminary and permanent injunction against your petitioner, the defendant therein, restraining such infringement and for an accounting of profits and damages.

III. That your petitioner duly appeared in said suit by Wetmore & Jenner, its solicitors, and answered the said bill of complaint, to which replication was duly filed.

IV. Upon information and belief that thereafter, upon the motion of the said Westinghouse Air Brake Company, complainant in said suit, and upon affidavits filed, and after hearing counsel on both sides, the said Circuit Court, Hon. E. HENRY LACOMBE, Circuit Judge, presiding, made an order, entered on the 18th day of October, 1901, that a preliminary injunction issue out of and under the seal of the said court, directed to your petitioner, the Christensen Engineering Company, defendant therein, its directors, officers, &c., restraining them and each of them until the further order of the court from making, using or selling any apparatus embodying the invention of claim 2 of said Letters Patent No. 481,134, and that all questions as to the infringement of claims 4 and 11 of said Letters Patent be reserved for final hearing.

V. That as your petitioner is now informed and believes a writ of injunction in accordance with said order was issued out of the said court on the 21st day of October, 1901, but as your petitioner has contended and still contends the said writ of injunction has never been served upon it.

VI. Upon information and belief that thereafter and on February 21st, 1903 the said Circuit Court of the United States for the Southern District of New York,

upon the application of said Westinghouse Air Brake Company, complainant in said suit, and upon divers affidavits presented to the said court, and after hearing counsel in support of the application and in opposition thereto, by a judgment or order filed said February 21st, 1903 ordered, adjudged and decreed that your petitioner, the Christensen Engineering Company, the defendant in said suit, was guilty of contempt of said Circuit Court in having disobeyed the said order entered on the 18th day of October, 1901 and the injunction issued by said court thereunder on October 21st, 1901, in that since the date of the entry of the said order and the date of the service of said injunction it had sold and delivered to the Boston and Maine Railroad Company four triple valves which were an infringement of claim 2 of said Letters Patent No. 481,-134, and further ordering, adjudging and decreeing that for said misconduct your petitioner, the Christensen Engineering Company, the defendant therein, be thereby fined the sum of One thousand dollars, Five hundred of which was adjudged to be paid to the United States of America through the clerk of said court, and Five hundred dollars to be paid to the complainont, the Westinghouse Air Brake Company within twenty days from the entry thereof, which judgment was entered in the office of the clerk of said Circuit Court on February 21st, 1903.

VII. Thereafter your petitioner feeling itself aggrieved by said judgment or order entered February 21st, 1903, petitioned the said Circuit Court for the Southern District of New York for an order allowing it, your petitioner, to prosecute a writ of error to the said United States Circuit Court of Appeals, for the Second Circuit, according to the laws of the United States in that behalf, and that an order be made fixing the amount of the security which the defendant should give, and, upon giving which, that all further proceed-

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ings in said Circuit Court be suspended and stayed until the determination of said writ of error.

VIII. That the aforesaid petition was granted and the writ of error prayed for was allowed and was issued out of said Circuit Court on the 23rd day of March, 1903, duly tested, and a true and complete transcript of the record and proceedings had in said Circuit Court in the cause of Christensen Engineering Company as plaintiff in error against the Westinghouse Air Brake Company as defendant in error as the same were of record and on file in the office of the clerk of said Circuit Court was duly certified by the clerk of said Circuit Court to the said United States Circuit Court of Appeals, for the Second Circuit.

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IX. That thereafter the said writ of error came on for argument in the said Circuit Court of Appeals, for the Second Circuit, and was heard on the 14th day of December, 1903 by the said Circuit Court of Appeals, the Hon. Wm. A. Wallace, Wm. K. Townsend, Alfred C. Coxe, Circuit Judges sitting, and thereafter on the 13th day of February, 1904, the said Circuit Court of Appeals filed an opinion or decision, a copy of which is hereto annexed, and your petitioner prays that the same may be considered as a part of this petition. Therein the said Circuit Court of Appeals holds, for the reasons therein stated, that it has no jurisdiction to entertain or consider your petitioner's said writ of error, being constrained to that conclusion as your petitioner understands the said opinion or decision by the views of your Honorable Court as expressed in the case of *in Re* Debs, reported in 158 U. S. 564, 573.

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X. Your petitioner further shows that the said suit, above mentioned in clause II of this petition, being at issue, testimony was taken on behalf of the respective parties and the same came on for hearing in the

said Circuit Court and was heard by the Hon. HOYT H. WHEELER, District Judge sitting as Circuit Judge, and was decided by him and an interlocutory decree was entered in said suit on the 18th day of March, 1903 sustaining the validity of said Letters Patent and claim 2, and also claims 4 and 11 thereof, which by said order granting a preliminary injunction had been reserved for final hearing, that your petitioner, the de-
22 fendant therein, had infringed the same and directing a permanent injunction and an accounting of profits and damages.

XI. That thereafter your petitioner, the defendant therein, feeling itself aggrieved by the said interlocutory decree sued out an appeal therefrom to the said Circuit Court of Appeals, for the Second Circuit, on the 16th day of April 1903, which was decided by said Circuit Court of Appeals on the 27th day of January,
23 1904 by an opinion or decision filed on that day, whereby the 2nd claim of said Letters Patent, being the claim as to which the injunction aforesaid was issued, was held to be invalid, but claims 4 and 11 were held to be valid and infringed. Thereafter and on the 4th day of February, 1904, your petitioner, the defendant in said suit, filed a petition for a rehearing of said appeal, and the Westinghouse Air Brake Company, the complainant in said suit, also, on the same day, filed a petition for a rehearing of said appeal,
24 which petitions are now, as your petitioner is informed and believes, held by the said court under advisement and awaiting its decision.

XII. Your petitioner further shows that it is advised and believes and therefore states the fact to be that the said judgment fining your petitioner One thousand dollars for contempt as aforesaid of the said order entered the 18th day of October, 1901, and of the said writ of injunction issued the 21st day of October, 1901, one-

half payable to the United States and one-half to the complainant in said suit was a final judgment reviewable only by writ of error to said Circuit Court of Appeals, and that unless said Circuit Court of Appeals shall take jurisdiction of your petitioner's said writ of error and consider and determine the same upon the merits thereof your petitioner is without remedy.

WHEREFORE, your petitioner prays that a writ of mandamus be granted by this Honorable Court commanding the said Honorable United States Circuit Court of Appeals, for the Second Circuit, to reinstate and take jurisdiction of your petitioner's said writ of error and to entertain and consider the merits thereof and decide the same upon the merits and for such other relief as may be just.

And your petitioner will ever pray, &c.

CHRISTENSEN ENGINEERING CO.
per S. W. WATKINS,
President.

STATE OF WISCONSIN,
Eastern District of Wisconsin, } ss:
CITY OF MILWAUKEE,

SAMUEL W. WATKINS, being duly sworn, says that he is the President of the Christensen Engineering Company, the petitioner above named. That he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except those matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

SAMUEL W. WATKINS.

Sworn to before me, this 18th day of February, 1904.

CHAS. L. GOSS
Notary Public
Milwaukee County,
Wisconsin.

(SEAL)

29 **Petition.**

STATE OF NEW YORK,
Southern District of New York } ss.:
CITY AND COUNTY OF NEW YORK

WILLIAM A. JENNER being duly sworn, says: That he is an attorney and counselor at law and is one of the solicitors for the Christensen Engineering Company, the petitioner above named; that he has read the foregoing petition and knows the contents thereof,
30 and that the matters of fact therein alleged are true of his own knowledge.

Deponent further states that on the 25th day of February, 1904 the said Circuit Court of Appeals for the Second Circuit made an order dismissing the writ of error of the said petitioner referred to in the foregoing petition but without affirming or reversing the order or judgment of the court below.

WM. A. JENNER.

Sworn to before me, this 25th
31 day of February, 1904

GRACE A. TAYLOR
(SEAL) Notary Public,
N. Y. Co.

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Opinion of Circuit Court of Appeals. 33

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

THE CHRISTENSEN ENGINEERING COMPANY,
Plaintiff in Error, 34

vs.

THE WESTINGHOUSE AIR BRAKE COMPANY,
Defendant in Error.

Before WALLACE, TOWNSEND and COXE, Circuit Judges.

WALLACE, Circuit Judge:—

This is a writ of error to review an order of the 35
court below adjudging the defendant in an equity suit brought to restrain the infringement of a patent guilty of contempt for violating an interlocutory injunction restraining such infringement.

This court has decided that such an order cannot be re-examined here unless upon an appeal from a final decree in the cause. If it can be reviewed in the court in which it was made at the final hearing of the cause, it is not a "final decision" within the meaning of Section 6 of the act conferring jurisdiction upon 36
this court. We reviewed such an order in Gould vs. Sessions (67 Fed. Rep., 163) but that case was decided before the decision of the Supreme Court in *Re* Debs (158 U. S., 564, 573). After the decision in *Re* Debs the question arose again in Nassau Electric R. Co. vs. Sprague Electric Co. (95 Fed. Rep., 415) and we dismissed the writ of error with this observation: "Upon the authority of the Debs case we are constrained to hold that the order cannot be reviewed ex-

37 **Opinion of Circuit Court of Appeals.**

cept upon an appeal from the final decree in the cause." In Cary Manufacturing Company vs. Acme Company (108 Fed. Rep., 873), we reviewed on writ of error an order imposing a fine upon the defendant in an equity suit for the violation of an injunction. The injunction however was not interlocutory, but was granted by the final decree. This circumstance was not referred to in the opinion, but explains the apparent conflict between
38 the decision and that in Nassau Electric R. Co. vs. Sprague Electric Co. The order was final in the sense that it was a judgment in a criminal case which was independent of and separate from the original suit, and which could not be reviewed on an appeal from the final decree in that suit. *Ex Parte* Kearney (7 Wheat., 38): New Orleans vs. Steamship Co., (20 Wall., 387, 392). In Butler vs. Fayerweather (63 U. S. App., 120), the question whether an order like the present could be reviewed by this court was not involved. The order
39 reviewed there was made in a cause to which the plaintiff in error was not a party, and committed him for his refusal to answer certain questions propounded to him as a witness; and the decision was placed upon the ground that in such a case the aggrieved party "has no opportunity to be heard when the cause is before the court at final hearing, and as to him the proceeding is finally determined when the order is made."

Whether the present order can be re-examined at the final hearing of the cause, at which time all previous
40 interlocutory orders are open for review, is a question which we are not now called upon to decide. Unless it can, there can of course be no review by an appeal from the final decree. In Worden vs. Searles (121 U. S., 14), an equity cause to restrain the infringement of a patent, two orders fining the defendant for contempt for the violation of a preliminary injunction were reviewed and reversed upon an appeal from the final decree. In that case however the court regarded the orders as only nominally proceedings in contempt.

The hardship of compelling a party to wait until he can appeal from a final decree to obtain a review, especially in cases in which the defendant has been committed and is suffering imprisonment, is manifest; and we should be glad to be able to see our way clear to depart from our former decision. That decision however was constrained by the decision in the Debs case, and the Debs case is an authority which cannot be disregarded. This was an equity cause in which some of the defendants were adjudged guilty of contempt for the violation of a preliminary injunction and sentenced to imprisonment. Having been committed to jail, they applied to the Supreme Court for a writ of error and also for one of *habeas corpus*. The court denied the writ of error, and it is stated by the reporter that it was denied "upon the ground that the order of the Circuit Court was not a final judgment or decree." When the application was made the act establishing Circuit Courts of Appeal (Section 5) authorized the Supreme Court to review by writ of error convictions in cases of infamous crime; and if the denial had been placed upon the ground that the case was not one of a conviction for infamous crime, and therefore was reviewable only upon a certificate of division of opinion, there would have been no conflict between the decision and and that in New Orleans vs. Steamship Co., (2 Wall., 387) in which the court held that contempt of court is a criminal offence, and the imposition of a fine is a judgment in a criminal case. We are not at liberty to assume that the Supreme Court overlooked its former decision in New Orleans vs. Steamship Co., or that its reporter incorrectly reported the later decision.

The writ of error is dismissed.

A true copy,

[SEAL] WM. PARKIN,
Clerk.